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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 349

SABENA BELGIAN WORLD AIRWAYS (SOCIETE ANONYME BELGE D'EXPLOITATION DE LA NAVIATION AERIENNE),

Petitioner,

—v.—

JACQUES L. LEROY, Administrator *Ad Prosequendum* of the Estate of PAUL LEROY, deceased and as Next Friend of MICHAEL P. LEROY, CHRISTINE M. LEROY and MIREN B. LEROY, Infants,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Statement of the Case

On February 13, 1955, Dr. Paul LeRoy, a 27 year old American geologist was killed in the crash of a DC-6 airplane owned and operated by Sabena Belgian World Airways. Dr. LeRoy left surviving a widow and three children.

The evidence adduced upon the trial established that the Sabena DC-6 had maintained constant radio voice communcation with an air traffic controller at Rome, Italy during the fatal portion of the flight. The crew had made suspicious transmissions concerning its report over a compulsory reporting point at Viterbo, Italy. The airplane

actually crashed at a site 50 statute miles east of the Viterbo beacon at a time and place from which the crew could not have possibly overflown the beacon.

When the wreckage was located, the heading of the airplane, the time of the crash, the known speed, and the distances were correlated, and all demonstrated beyond cavil that the crew had falsified its position. In fact, the unusual nature of the crew's last transmissions then became patently clear for it was evident that they were hiding their uncertain position from the traffic controller and conveniently making up a reporting time over Viterbo to prevent discovery of violations of airways rules. By proceeding, as aforesaid, the crew avoided penalties for drifting beyond the airways, but in so doing gambled with the lives of everyone on board.

The radio transmissions from the crew further disclosed that they were invoking procedures for which they would have no possible need except to re-locate their position in event that they had falsified it.

Wilful misconduct was proven overwhelmingly. The trial court indicated that there was no question on the merits and the Circuit Court of Appeals concurred that "a substantial recovery was warranted".

It is respectfully submitted that the conduct of the crew was so gross and wanton that a criminal prosecution for manslaughter could probably have been sustained had the crew survived.

After a special verdict in which the jury found wilful misconduct on the part of the Sabena crew, a trial was had before the District Court judge sitting without a jury which resulted in a judgment of $205,705 in favor of the widow and children of Dr. LeRoy.

The Circuit Court of Appeals unanimously held that the judgment should be affirmed and ordered a re-computation to increase the amount of the damages. Judge Medina, in a concurring opinion, dissented partially as to the manner of recomputing the damages only.

The petitioner raises no issue as to the merits of the case in this petition, but alleges that this Court should consider (1) the question of pretrial rulings and (2) whether the trial court should have charged that there was a presumption in law that the crew acted with due diligence. We shall answer these questions in the order presented.

POINT I

The Pre-Trial Ruling

a. *Subject of the Ruling*

Throughout the world, aviation traffic is controlled by very high frequency radio along the airways, using English as the standard language (S. M.* 86, 205, 280, 281, 342, 326). The frequencies are monitored in each traffic control center and recorders, called automatic tele-communications logs, keep a permanent record. This procedure was established by international treaty. (The Chicago Convention, annex 10, Air Navigation Services, Radiotelephony Procedures ICAO Documents 7181-COM/546/4.)

The Court of Appeals acknowledged this undisputed fact (see Petitioners App. B, p. 35a).

> "From the deposition and testimony of Captain Pierre Dils of Sabena and the undisputed testimony of the

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* S. M. refers to Steno Minutes.

plaintiff's expert; Captain Richard Hettenbaugh, it appears that major airports were required to keep either a written or a recorded telecommunications log. The latter, which automatically records transmissions to and from the controller, was in use in Italy in 1955."

Interested users could obtain transcripts of the log from any governmental agency concerned (S. M. 343).

The plaintiff obtained a sealed copy of the recording from the Italian Air Ministry, which further was an appendix to its accident report.

b. *The Obstructionism of the Defendant, Sabena, Herein*

The defendant had sent four highly skilled advisors to participate in the Italian investigation together with a representative of the Belgian Government (S. M. 238, 239, 246). Sabena was a nationalized airline with the Government owning 51% of its stock (S. M. 202).

Despite the fact that they had spent weeks in Italy listening to the tapes, climbing the mountain to visit the scene, viewing the wreckage, etc., defendant alleges that no one had made any observations whatsoever (S. M. 261). They never made a written or oral report of their observations to anyone (S. M. 247).

On cross-examination it was disclosed that Sabena had taken S-55 type helicopters from Brussels all the way to Italy and then to the wreckage site. The helicoptors were fitted with sensitive altimeters. Sabena claimed it had no idea of the altitude of the crash (S. M. 254 and 248). This was manifestly improbable.

The defendant did, however, rely upon the Italian Government to conduct the investigation of the accident and elicit all the facts (S. M. 265, 267). The defendant's com-

plete reliance upon the Italian Government may be further gleaned from the fact that when they discussed the theory of the accident with the Belgian Government, they had nothing but the Italian Government Report before them (S. M. 272 and 273). They relied upon the appendages of the Italian Government Report to conclude that "the winds were somewhat greater than forecast" (S. M. 272). In responding to the interrogatories in this case they used the Italian Government Report and their Radio Facility Charts (S. M. 265).

At the pre-trial hearings the defendant objected to the introduction of every map, chart, photograph, telecommunications log, weather reports, etc. despite the fact that these documents were records and data kept of all aircraft, *regardless of a crash.*

It was evident that the defendant was bent upon a path of obstructionism to bury every documented fact surrounding the crash.

c. ***The Proceedings Before the Judge at Pre-trial***

Nowhere in the petition submitted to this Court by Sabena does it even mention the sworn interrogatories and depositions taken of the defendant.

Prior to pre-trial, the plaintiff had taken sworn interrogatories and depositions of the defendant in which a copy of the telecommunication log (Exhibit 15) was affixed and the defendant questioned at length upon this exhibit. Any fair reading of the defendant's responses would conclude that the defendant admitted it was a business record and admitted its authenticity.

The plaintiff thereafter, upon written notice to the defendant, sought a ruling at pre-trial as to the admissibility

of the exhibit. The pre-trial judge (Judge Bonsal) ruled the exhibit admissible, reserving the defendant's right to introduce evidence contrary thereto. The pre-trial judge ruled upon the basis of *sworn* interrogatories and depositions before the court upon notice.

d. *The Ruling of the Trial Judge*

The exhibit (15) was introduced into evidence at the trial. The trial Judge (Judge Murphy) admitted it without going behind the basis of the ruling of the pre-trial judge. Judge Murphy said:

> "We did not admit it merely because Judge Bonsal admitted it but rather because the defendant did nothing about Judge Bonsal's ruling although it was made two years before the trial, thus lulling the plaintiff into a sense of security and preventing him from preparing the necessary foundation for its admission either by calling the Italian witnesses or taking their testimony abroad. It seems to us that the defendant could have done more than sit idly by for two years."
>
> (Petitioner's App. B., page 37a)

The trial court did not bother to comment upon the interrogatories and depositions before the pre-trial judge, but rather followed the pre-trial ruling citing the laches of the defendant.

The Court of Appeals did go behind the ruling, however, and examined the record of *both* rulings, upon pre-trial and trial, and held that the exhibit was properly admitted into evidence.

e. *The Question Presented Upon the Petitioner's Writ Is Moot*

The Court of Appeals decided the exhibit was admissible upon the *concessions* made by the defendant in the interrogatories and depositions. The Court of Appeals said:

> "The only objection relevant to this link in the chain is that the exhibit was not certified as required by Rule 44 (a) of the Federal Rules of Civil Procedure. But Sabena conceded that there is 'no discrepancy' between the exhibit and the appendix to the Italian government's report. Certification could have done no more. Accordingly, exhibit 15 was admissible if the appendix would have been admissible.
>
> "Concessions by Sabena also go far toward answering the second question—whether the appendix would have been admissible. Sabena's answers to pre-trial interrogatories establish that the transcript was indeed an appendix to an accident report and that the report was compiled by the Ministerio Difesa Aeronautica of the Italian government."
>
> (Petitioner's App. B, page 13a.)

The Court of Appeals correctly pointed out that the question of pre-trial rulings cannot be reviewed in this case upon appeal, for in this particular instance the trial judge, while correctly following the pre-trial ruling, was *required* to admit the exhibit.

The Court demonstrated that in addition to making concessions as to the document's authenticity, in its answers to sworn interrogatories the defendant further, in all of its arguments below, suggested no extrinsic circumstances which would give reason to doubt the document's trustworthiness. The Court concluded that it would have been error for the trial court to have excluded the document.

The Court of Appeals said (Petitioner's App. B, p. 18a):

"The final issue with respect to admission of exhibit 15 arises from the fact that Judge Murphy appears to have admitted it solely on the basis of Judge Bonsal's pre-trial ruling. Whether that was a sound basis for admitting the exhibit is a nice question. It is of course customary for a district judge to follow an earlier ruling by one of his brothers in the same litigation, though he is not bound to do so. Dictograph Products Co. v. Sonotone Corp., 230 F. 2d 131 (2 Cir.), rehearing denied, 231 F. 2d 867, petition for cer. dismissed, 352 U. S. 883 (1956). But despite Professor Moore's flat statement that admissibility may be ruled on at pre-trial, 3 Moore, Federal Practice Para. 16.16, at p. 1122 (1964), the efficacy of such rulings necessarily is limited by the first judge's inability to foresee the circumstances of the trial which may be relevant to admissibility. Cf. Fidelity and Casualty Co. v. Frank, 227 F. Supp. 948, D. Conn. (1964).

We need not resolve that issue here, however, for this is not a case in which admissibility was a matter within the district court's discretion. We conclude that in this case Sec. 1732 required admission of exhibit 15.

The district court's discretion with respect to Sec. 1732 is a discretion in judging whether the document offered 'has an inherent probability of trustworthiness.' Central RR v. Jules S. Sottnek Co., 258 F. 2d 85, 88 (2 Cir. 1958). It is therefore a necessary premise for its exercise that the document's trustworthiness be in doubt. See Shenker v. United States, 322 F. 2d 622, 627 (2 Cir. 1963), cert. denied, 376 U. S. 907 (1964) (entry made by employee of party); Puggioni v. Luckenbach Steamship Co., 86 F. 2d 340 (2 Cir. 1961) (same); Central RR v. Jules S. Sottnek Co., supra

(accident report based on bystanders' volunteered statements and containing conclusions as to the accident's cause). As we have attempted to demonstrate, however, nothing in the nature or content of exhibit 15 gives any reason to doubt its trustworthiness, and Sabena in all of its argument has suggested no extrinsic circumstances which would raise such doubt. To exclude such a document as exhibit 15 on the mere speculative possibility of error or fraud would frustrate the evident purpose of the statute.

We therefore conclude that there was no error in receiving exhibit 15."

Judge Medina, in a concurring opinion, held that exhibit 15 was admissible because of the concessions made by the defendant in its answers to sworn interrogatories and that this does not alter the right of a trial judge, in a proper case, to change a pre-trial ruling. Judge Medina said (at Petitioner's App. B, page 28a):

"Exhibit 15

I believe the reasoning adopted by my brothers to support the admissibility of Exhibit 15 is unduly involved and circuitous. *'The concessions made by Sabena in its answers to pre-trial interrogatories establish that this Exhibit is a composite report compiled by the Department of the Italian Government charged with the duty of preparing such reports in connection with aeroplane accidents. As the trial record contains absolutely nothing to challenge the trustworthiness of this composite report or even indicate that it is in any particular inaccurate, the report was properly received in evidence.* Of course, the report contains hearsay. But the very purpose of the Federal

Business Records Act, 28 U. S. C., Section 1732, is to make such hearsay admissible, subject to proof affecting the probative weight to be given to the document and its contents by the trier of the facts. It is particularly important that the rule be simply stated and easily applied in cases of aeroplane accidents where, more often than not, there are no survivors.'

The Pre-trial Order

As F. R. C. P. Rule 16 expressly provides that the pretrial order 'when entered controls the subsequent course of action, unless modified at the trial to prevent manifest injustice,' I construe Judge Murphy's ruling as a refusal to modify Judge Bonsal's pre-trial order making Exhibit 15 admissible, but reserving the right of Sabena to introduce proof to contradict it. That a contrary ruling at trial would have caused rather than prevented manifest injustice seems to me to be clear. Judge Murphy's ruling was correct, despite the fact that he mistakenly supposed no foundation had been laid for the admission of Exhibit 15. But this is not to say that a trial judge has no power to change a ruling made at pre-trial. See Clark v. Pennsylvania Railroad Company, 2 Cir., 1964, 328 F. 2d 591; Dictograph Prods. Corp. v. Sonotone Corp., 2 Cir., 1956, 230 F. 2d 131, 134-36, petition for cert. dismissed, 352 U. S. 883."

In the case at bar, both the pre-trial judge and the trial judge ruled alike, albeit for different reasons. The academic question becomes moot since it is manifestly clear that the correct and just result was reached with justice rendered to the widow and children of Dr. LeRoy.

f. There Is No Conflict in the Decisions

Despite the fact that in the case at bar the question of the pre-trial ruling is moot, the defendant claims that this Court should review the question of pre-trial rulings, claiming there is a conflict of the decisions within the circuits.

The defendant correctly cites authorities holding that questions of evidence may be ruled upon at pre-trial (at page 5, paragraph 2 of the petition herein). But the defendant cites *Lynn* v. *Smith*, 281 F. 2d 501 (3d Cir. 1960) as contrary to that proposition and therefore claims that this Court should take jurisdiction on the basis of a conflict between the circuits.

It is respectfully submitted that no conflict exists in that the *Lynn* case is utterly inapplicable and can easily be distinguished. In the *Lynn* case the District Court ruled upon casual *unsworn remarks* made by the District Attorney at a pre-trial conference in an action for malicious prosecution. The Court dismissed the plaintiff's case solely upon the unsworn remarks of the District Attorney at pre-trial. The Court of Appeals for the Third Circuit held that this was error in that the jury was entitled to decide the case.

The *Lynn* case is far removed from the case at bar in which Judge Bonsal at pre-trial ruled upon *sworn* interrogatories and depositions taken of the defendant. These depositions and interrogatories were part of the case and taken specifically to reduce trial issues and crystalize the evidence.

It is respectfully submitted that no conflict exists between the circuits.

In addition to the cases and authorities supporting the proposition that the admissibility of evidence may be ruled

upon at pre-trial, as cited in the petitioner's brief (see authorities cited by petitioner at p. 5, para. 2 of the petition herein), several circuits have pointed out the need to strengthen pre-trials and eliminate baseless issues.

In *Holcomb* v. *Aetna Life Insurance Co.* (10 Cir. 1958), 255 F. 2d 577, cert. denied, 79 S. Ct. 118, page 580, the Court said:

> "Pre-trial conference is more than a mere conference in which the court seeks to eliminate groundless allegations or denials, and the Court has the power to compel the parties to agree to all facts concerning which there can be no real issue."

Speaking of pre-trial procedures, the Court stated recently in *Clark* v. *Pennsylvania Railroad Co.* (2 Cir. 1964), 328 F. 2d 591:

> "One of the prime objectives of this new, but now firmly established procedural device, is to do away with the old sporting theory of justice and substitute a more enlightened policy of putting the cards on the table, so to speak, and keeping surprise tactics down to a minimum".

The ruling of the judge at pre-trial was within his sound discretion and was eminently correct.

g. On the Certification of the Exhibit

During the trial below, plaintiff introduced Exhibit 15 which was a published copy of the radio transcript and bore the seal of the Italian Air Ministry. The defendant interposed a further objection that the copy was not certified. The Court of Appeals held that it was not necessary as the defendant had admitted its authenticity in the interrogatories and certification could have supplied no more.

Nevertheless, the plaintiff submitted a certified and authenticated copy of Exhibit 15 on the appeal. The certification was obtained subsequent to the trial.

The defendant characterized the authentication as spurious, claiming that the Italian government does not certify to private attorneys.

The defendant is well aware, through proceedings below, that the plaintiff obtained the certification and authentication through diplomatic channels, for the original transcript had already been certified by the Italian government to the Belgian government and the International Civil Aviation Organization.

The sham nature of the defendant's assertions may be gleaned from the fact that the defendant conceded that the exhibit was an exact copy of their transcript received from the Italian government. In fact, the depositions demonstrated that the defendant's Vice President had recognized the voices of the crew on the original tape recording.

The Court of Appeals said at p. 13a of petitioner's appendix B: "* * * but Sabena conceded that there is 'no discrepancy' between the exhibit and the appendix to the Italian government's report. Certification could have done no more." Thus, the certification was mere surplusage which did not alter the merits justifying admissibility into evidence of this exhibit which had been conceded as having "no discrepancy".

POINT II

The defendant was not entitled to a charge of presumption of due care by its crew.

The defendant claims that it was entitled to a charge that its crew was "presumed to be acting with due diligence and due care".

Defendant cites in support of this proposition cases from other circuits.

State law applies in the Federal Court as to presumptions (Bender's N. Y. Law & Proof, Section 230.10) as they affect the burden of proof. In New York, indeed, a presumption of the defendant's negligence arises in the event of an airplane crash, and the doctrine of *res ipsa loquitur* is invoked so as to draw the *presumption of negligence upon the part of the defendant* (*Citrola* v. *Eastern Air Lines Inc.*, 264 F. 2d 815 (2d Cir. 1959)).

Accordingly, the trial court was correct in denying this request to charge a presumption of due care upon the part of the crew and, in lieu thereof, he held this to be a question of fact which would be a proper subject of final argument to the jury rather than a matter of law to be drawn as a presumption in the defendant's favor (S. M. 853, 854 and 855).

The Court of Appeals agreed that the trial court was not required to so charge.

It is further submitted that the New York law is good law in that in airplane accident cases there is frequently very little direct evidence of the circumstances of the accident. The airline has control of the airplane, and frequently has most of the attendant facts and circumstances

within its own possession and control. Whether or not to apply the doctrine of *res ipsa loquitur* depends upon the procedural law and rules in each state.

Since New York does not entertain a presumption of due care on the part of a deceased crew as against a deceased passenger, the courts below ruled correctly. This Court should not be called upon to make questions of evidence and procedure uniform in civil cases in the fifty states.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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New York, N. Y.
September 7th, 1965.

END